

SERVED: February 2, 2005

NTSB Order No. EA-5136

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of January, 2005

APPLICATION OF)	
)	
ESTAN FULLER, WILLIAM SCHWAB,)	
EDWARD KNAPP, and TIMOTHY GEHRES,)	Dockets 285-EAJA-SE-16202,
)	283-EAJA-SE-16212,
For an award of attorney fees)	282-EAJA-SE-16211,
and expenses under the)	and 284-EAJA-SE-16210
Equal Access to Justice Act)	
)	
)	

ORDER GRANTING RECONSIDERATION

The Administrator has petitioned for reconsideration of NTSB Order No. EA-5035, served in this case April 11, 2003, on the grounds that it was erroneous. In that order, the Board noted it had been unable to reach a majority decision and, therefore, dismissed the Administrator's appeal from the initial decision of Administrative Law Judge William R. Mullins, served on October 4, 2001, in which the law judge granted in full the applicants' request for fees and expenses totaling \$44,638.78 under the Equal Access to Justice Act (EAJA).¹ For the reasons below, the petition for reconsideration is granted and the law judge's initial decision is reversed.

¹ A copy of the initial decision is attached. The applicants filed a reply opposing the Administrator's petition for reconsideration.

Background

Applicants were all contract pilots for Sunjet Aviation, Inc. (Sunjet). After the 1999 crash of one of Sunjet's aircraft, the FAA and the Federal Bureau of Investigation initiated investigations of Sunjet's operations. Training records were reviewed. Emergency orders of revocation were issued against applicants based on the Administrator's belief that applicants had intentionally falsified training certificates showing that training occurred on dates when it could not have occurred because applicants or the instructor were elsewhere or otherwise occupied. The Administrator took the position that the date on the certificate was expected to be the date of the training (or the date training was completed).² She introduced evidence to show that Sunjet's time and duty rosters also failed reliably to prove that training had occurred, and she further supported her case by showing that none of the four individuals had logged any of the purported training in his logbook.

With one exception, applicants testified that the certificates they signed had not yet been dated. They all testified that they had received all required training before operating aircraft, and that they relied on Sunjet's Director of Operations to complete the necessary paperwork properly. The testimony generally showed, and the law judge found, that training had not occurred on the dates shown on the training certificates. Applicants argued, however, that the certificates did not purport to indicate when the training had occurred, only that it had occurred on or prior to the certificate's date.

Sunjet's Director of Operations, who prepared and signed the certificates, testified that he dated them after he was certain that all training had taken place. In explanation of why time and duty rosters were incorrect, he testified that he had been having personal problems and must have made mistakes in the entries.

The law judge dismissed the complaints against all applicants, crediting their explanation and understandings. We affirmed in NTSB Order No. EA-4887 (2001), and the applicants filed their EAJA application, which was granted by the law judge. As stated above, the Board found itself unable to reach a majority decision on the Administrator's appeal from the law judge's decision granting the EAJA award.³ Accordingly, in NTSB

² The Administrator cited regulations requiring that the date of completion of training be recorded. 14 C.F.R. 135.63(a)(4)(x).

³ As noted in Order No. EA-5035, Member Carmody and former
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Order No. EA-5035, the Board dismissed the Administrator's appeal and noted that the initial decision would become the law of the case, without binding effect in future proceedings. This petition for reconsideration followed.

The Administrator argues in her petition for reconsideration that the law judge's finding that the Administrator was not substantially justified and his resulting grant of the EAJA award was erroneous because the case rested on credibility. The Administrator cites our long-standing case law holding that "when key factual issues hinge on witness credibility, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to a hearing where credibility judgments can be made on those issues."⁴ In support of her petition the Administrator also cited our decision in Application of Jones, NTSB Order No. EA-5006 (2003), affirmed, Jones v. NTSB, 2003 WL 22417149 (Docket No. 03-11114, 11th Cir. September 30, 2003), in which we overturned the law judge's granting of an EAJA award in a related case involving a Sunjet pilot-examiner who the Administrator alleged had falsified check ride forms relating to the same pilots who are applicants in this case. The Administrator asserts that the facts and circumstances of these cases are "almost identical" to those in Jones and, accordingly, the grant of EAJA fees based on a finding that the Administrator lacked substantial justification in this case is arbitrary and capricious in light of the Board's denial of EAJA fees based on the opposite conclusion (i.e., that the Administrator was substantially justified in proceeding to hearing) in Jones.

In their reply, the applicants contend that: (1) our rules for EAJA cases (49 C.F.R. Part 826) do not provide for petitions for reconsideration; rather, the only avenue for appeal is judicial review pursuant to § 826.39; (2) the Administrator had information prior to issuing the emergency orders of revocation indicating that there was no substantial justification for those actions, and that the case therefore does not turn on the law judge's credibility finding;⁵ and (3) these cases are not

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Member Black would have granted the Administrator's appeal, and former Members Hammerschmidt and Goglia would have denied it.

⁴ See Administrator v. Caruso, NTSB Order No. EA-4165 (1994); Administrator v. Conahan, NTSB Order No. EA-4276 (1994); and Administrator v. Martin, NTSB Order No. EA-4280 (1994).

⁵ Specifically, the applicants assert that the Principal Operations Inspector for Sunjet was aware of the explanation offered by Sunjet's Director of Operations for the erroneous dates on the training certificates: that he had dated the forms after the training was complete and after the pilots signed the

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sufficiently similar to the Jones case to require a similar result on the EAJA applications. We will address each issue in turn.

Petitions for Reconsideration in EAJA Cases

We recognize that our procedural rules governing EAJA proceedings do not explicitly provide for petitions for reconsideration of law judges' decisions on EAJA applications. However, those rules state, in § 826.31, that our rules of practice in air safety proceedings (49 C.F.R. Part 821) will apply to EAJA proceedings unless they are superceded by or are inconsistent with a provision in our EAJA rules. As evidenced by our consistent practice of considering and ruling on petitions for reconsideration in EAJA cases,⁶ we do not view our EAJA rules as being inconsistent with or superceding that provision. Accordingly, the Administrator's petition is authorized under our rules.

Substantial Justification

In granting the EAJA application, the law judge found that the Administrator had not been substantially justified. The law judge concluded:

To support its (sic) conclusion, the Administrator presented evidence establishing that none of the Applicants could have received training on the date shown on the certificate. A careful reading of the certificates, however, reveals that the date indicated on the certificate is not necessarily the date upon which the training was performed. Instead, by signing the certificates, each Applicant certified that he "received the training as described below *prior to serving or continuing to serve as PIC/SIC*"⁷ under the Air Carrier Certificate. The Administrator presented no evidence that such a conclusion is unwarranted...

This reasoning is faulty. The Administrator's burden in this

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forms, and that the date on the form was not necessarily the date the training was accomplished, nor did it purport to be. The applicants also point out that the Administrator did not contact the pilots to ask whether they had received the training.

⁶ See, e.g., Application of Whittle, 5 NTSB 731 (1986), and Application of Alphin, 5 NTSB 187 (1986), for examples of EAJA cases in which we cited 49 C.F.R. § 821.50 as our authority for considering the petitions for reconsideration.

⁷ Pilot-in-command or second-in-command.

EAJA case is not to show that applicants' interpretation of the certificate is wrong, but only to show that her interpretation was a reasonable one.

The law judge accepted applicants' argument that Sunjet interpreted the certificate to allow the Director of Operations to date the certificate any time after the training had taken place. However, there was significant other information on which the Administrator could reasonably have relied to support her belief that applicants had not received the required training and had falsified their training certificates.

All applicants were long-time pilots and were well aware of the importance of proper and complete training records. The training certificates included the following blanks to fill in:

[Ground] Training Hours: _____ Date: _____

Instructor Signature

Student Signature

In our view, it would have been reasonable in fact to expect that the blank labeled "date" immediately following the number of training hours, referred to the date training had occurred, and despite the confusion on the record on this point, that applicants would well have understood the importance of an accurate date for various follow-up training requirements.

Prior to filing the complaints, the Administrator's inspectors interviewed Sunjet's Director of Operations, who offered the above explanation that the dates were not meant to indicate the dates training actually occurred. However, this explanation was undercut by two significant facts.

First, the company's time and duty rosters contained errors in that they indicated training had occurred on dates when it could not have occurred for various reasons (such as, for example, the instructor was out of town). In one example, both the training certificate and the corresponding time and duty roster showed that training had taken place on a particular date, but that date was shown to be wrong when logbooks indicated that either the pilot or the instructor had been elsewhere on the date in question. (Transcript (Tr.) Volume II at 269, 274-5.) The Director of Operations explained that he must have been preoccupied with personal problems and had made mistakes in entering the dates.

Second, the logbooks of the four applicants contained absolutely no corroboration that any of the training in question had occurred. Although there is no requirement to log training hours, the Administrator was not unreasonable in considering this absence of logbook entries documenting training hours noteworthy, especially in light of the other evidence that the training had

not occurred and when her inspectors otherwise found the logbooks to be "extraordinarily complete." (Tr. Volume I at 236.)

We agree with the Administrator that this case rested on credibility questions. Specifically: were the applicants' and Sunjet's purported interpretations of the certificates to be believed? Should applicants' explanation for the lack of log entries be believed? Were the entries absent because the training had never taken place or were they absent because applicants, uniformly but merely coincidentally, simply did not record any flight training? Were there coincidental errors in the time and duty rosters? Or, was this all an elaborate story to explain away various record keeping falsifications? There can be no doubt that the case turned on the law judge's credibility findings. This is clear from the law judge's rulings at the hearing and in his initial decision on the merits,⁸ as well as in the full Board's affirmance⁹ of that decision.

The Administrator may choose not to believe self-serving statements,¹⁰ and to pursue revocation action, even if resolution

⁸ The law judge denied the applicants' motion for directed verdict at the close of the Administrator's case in chief, noting that the Administrator had put on evidence that the date on the allegedly falsified certificates should reflect the actual date on which the training was given or completed. We view this ruling as an acknowledgement that the Administrator had sufficient evidence to proceed to trial. The law judge's dismissal of the complaints at the conclusion of the hearing was based on his credibility finding in favor of the applicants' testimony that they "did not lie when they signed" the certificates. (Tr. Volume II at 358.)

⁹ The Board noted that, despite the absence of records to substantiate that the training occurred as attested on the certificates, "[t]he law judge could still reasonably conclude, as he did, that the respondents were being truthful when they testified under oath that they had received the training reflected on the certificates." We also stated, "the law judge believed the respondents when they testified that all required training had been received as attested to on the certificates; that is *prior* to their service as pilots on the aircraft..." and explained that when "a law judge credits the testimony of a respondent on the issue of intent to falsify [it] tips the evidentiary scale away from a violation finding." Administrator v. Fuller, Schwab, Knapp, and Gehres, NTSB Order No. EA-4887 (2001).

¹⁰ Applicants make much of the FAA's failure to interview them -- in their view, losing its opportunity to learn the truth. While the failure to interview those suspected of regulatory transgressions is a valid factor to consider in analyzing the

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of that action will depend entirely on credibility assessments. As noted above, our long-standing caselaw holds that when key factual issues hinge on witness credibility, the Administrator is substantially justified -- absent some additional dispositive evidence -- in proceeding to hearing where credibility judgments can be made.¹¹ We find that there was no such dispositive evidence in this case. Thus, based on all of the evidence of record, we find that the Administrator's position was substantially justified, and that the law judge's initial decision granting the EAJA requests must be reversed.

Applicability of Jones to this Case

Regarding the applicants' third point, we agree that the facts and circumstances in Jones are not identical to those here. Therefore, the result in that case does not dictate a similar result in this case. However, in light of our independent finding that the Administrator was substantially justified in proceeding against these applicants, this is a moot point.

In sum, because the initial decision was erroneous as a matter of law, we grant the Administrator's petition for reconsideration and hereby reverse the initial decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's petition for reconsideration is granted;
2. Order No. EA-5035 is vacated; and
3. The law judge's initial decision granting fees and expenses is reversed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, Member of the Board, concurred in the above order. HEALING and HERSMAN, Members, did not concur, and submitted the following dissenting statements.

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question of substantial justification, in this case such interviews would merely have been cumulative. They would not have determined whether what all these individuals were saying was, in fact, the truth. And, the pilots' ultimate testimony that they signed blank certificates does not make their statements more believable or convincing.

¹¹ See Application of Petersen, NTSB Order No. EA-4490 (1996) at 6, citations omitted. Accord Application of Martin, NTSB Order No. EA-4280 (1994) at 8; and Application of Lepping, NTSB Order No. EA-4966 (2002).

DISSENTING STATEMENT

Notation 7348C

Member Healing, Dissenting:

The EAJA application of Fuller, Schwab, Knapp, and Gehres is based on the lack of evidence that the FAA had in the prosecution following them being found not guilty of the charges. By finding them not guilty, the Law Judge ultimately made a decision that the FAA lacked the evidence necessary to convict respondents of the charges. The applicability of the EAJA hinges on the question did the FAA lack any "Substantial Justification" to carry out the charges in the first place, in addition to lacking enough evidence to prove their case. "Substantial Justification" should not be taken to mean "a hint of suspicion" or a "reasonable doubt", rather the phrase bears the heavier burden of considerable concrete evidence. Based on the information the FAA should have had prior to bringing charges, which included the same witness testimony available to the judge, the fact that the FAA helped set up the ambiguous record keeping system, and that the FAA was responsible for following up on whether the system was understood and properly executed, I am convinced they did not meet the substantial justification requirements in this case.

Dissenting Statement

Notation 7348C (Order on Reconsideration: Fuller, Schwab, Knapp, and Gehres)

Member Hersman, Dissenting:

I would like to concur in part, with Member Healing's dissent. I cannot agree with the majority's decision to reverse Judge Mullins' decision granting the EAJA award in this case. With careful review of the grounds for excusing an Administrator from liability under the EAJA, I believe the applicants are entitled to reimbursement of attorney fees and other expenses incurred. In light of the intimate knowledge and involvement of FAA inspectors in the creation and approval of the training certificates in question, as well as pre-hearing information obtained by the FAA, I do not believe the Administrator's position meets the "Substantial Justification" standard. FAA's prior knowledge and understanding of Sunjet's training records confirm that they were aware prior to the hearing of the pilots' position that dates on certification forms did not necessarily represent the exact date in which training was actually received and/or even completed. The Administrator's decision to continue to a hearing on the basis of this evidence is not substantially justified, since she was aware that discrepancies in these dates alone did not show adequate cause for bringing allegations of intentional falsification. Rather it is a prime example of the objectionable action which the EAJA is intended to discourage, i.e. proceeding to a hearing without a reasonable basis.

With the goal of accident prevention, the NTSB is often critical of the FAA's oversight efforts, continually encouraging their diligent supervision of airline safety. In this environment of ever-present pressure from the Safety Board, I recognize and commend the Administrator's commitment to ensuring the integrity and accuracy of airline pilot training records. However, as the Board stated in Application of Scott, NTSB Order EA-4274 at 5 (1994), "under EAJA, the Administrator has a duty to discontinue h[er] investigation or prosecution at any time [s]he knows or should know that h[er] case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator [i]s required to analyze, as more information becomes available to h[er], whether continued investigation and prosecution [i]s reasonable" (emphasis original). Given the information available in this case, the Administrator's repeated appeals to the Board for reconsideration of this case as well as subsequent request for reconsideration of the ALJ's initial EAJA award seem unjustifiable.